

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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LUCY VIRGILIO, et al., :  
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:  
v. :  
:  
MOTOROLA AND CITY OF NEW :  
YORK :  
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**ORDER GRANTING**  
**DEFENDANTS' MOTIONS TO**  
**DISMISS**

03 Civ. 10156 (AKH)

ALVIN K. HELLERSTEIN, UNITED STATES DISTRICT JUDGE:

The parties appeared before me on March 4, 2004 for oral argument on the defendants' motions to dismiss this case pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. I reserved judgment at the time and now issue my decision.

A Rule 12(b)(6) motion requires the court to determine whether plaintiff has stated a legally sufficient claim. A motion to dismiss under Rule 12(b)(6) may be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Branum v. Clark, 927 F.2d 698,705 (2d Cir. 1991). In evaluating whether plaintiff could ultimately prevail, the court must take the facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff. See Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co., 32 F.3d 697, 699-700 (2d Cir. 1994).

This action was brought by the personal representatives of twelve New York City firefighters who lost their lives on September 11, 2001 in the collapse of World Trade Center Towers One and Two. The amended complaint asserts numerous claims against Motorola and the City of New York for allegedly providing the firefighters with faulty radios, depriving the firefighters of adequate protection and making fraudulent misrepresentations regarding the radios. Plaintiffs bring these claims under the Air Transportation Safety and System

Stabilization Act (the Act). See 49 U.S.C. § 40101, Pub. L. No. 107-42, 115 Stat. 230, 240 (Sept. 22, 2001), as amended by Pub. L. No. 107-71, § 201, 115 Stat. 597, 645 (Nov. 19, 2001); and Virgilio, et al. v. Motorola and City of New York, 2004 U.S. Dist. LEXIS 1194 (S.D.N.Y. 2004).

Congress established the VCF “to provide compensation” to victims of the September 11th attacks without facing the uncertainties of litigation. The Act § 403. To balance this extraordinary relief, Congress enacted a waiver provision: “Upon the submission of a claim [to the VCF], the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes.” The Act § 405(c)(3)(B)(i). Thus, Congress provided a choice between entering the VCF or filing a lawsuit. See Graybill v. City of New York, 247 F. Supp. 2d 345, 349 (S.D.N.Y. 2002). I previously ruled that this choice was made upon “submission of a claim,” which I held occurred on the earlier of January 22, 2004 or the date the Special Master deemed the claim substantially complete. In re September 11 Litigation, 2003 U.S. Dist. LEXIS 23561, \*6-7 (S.D.N.Y. Dec. 19, 2003). Plaintiffs have filed claims with the Victim Compensation Fund (VCF). Of the remaining plaintiffs, five have accepted payments from the VCF,<sup>1</sup> two have claims in the hearing phase,<sup>2</sup> and four have claims that are not substantially complete.<sup>3</sup> Only one has dismissed her claim in this court.<sup>4</sup>

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<sup>1</sup> The five are: Lucy Virgilio, Gerard Prior, Maureen L. Dewan-Gillian, James and Barbara Boyle, and Edward Sweeney.

<sup>2</sup>The two are: Geraldine Halderman and Patricia DeAngelis.

<sup>3</sup> The four are: Eileen Tallon, Gerald Jean-Baptiste, Alexander and Maureen Santora, and Raffaella Crisci.

<sup>4</sup> Catherine (Sally) Regenhard, personal representative of Christian Regenhard, voluntarily dismissed her claim by Order of March 2, 2004.

The defendants argue that the case should be dismissed because the plaintiffs have waived their right to sue by submitting a claim to the VCF. Plaintiffs contend that the waiver provision should not apply to their claims against Motorola and New York City because Congress intended the waiver provision to apply only to negligence claims. Plaintiffs further argue that if the waiver provision applies to these claims, the wrongful death claims against New York City are permissible under the “collateral source obligation” exception to the waiver provision. See the Act § 405(c)(3)(B)(i) and § 402(6) (defining collateral source obligation to include “life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to” the attacks). Plaintiff’s previously raised identical arguments before Judge Haight, sitting in Part I, who deemed them unpersuasive. See Virgilio, et al. v. Motorola and City of New York, 2004 U.S. Dist. LEXIS 1194, \*25-45 (S.D.N.Y. Jan. 29, 2004). I concur with Judge Haight’s decision and adopt his findings as my own. Thus, I hold that the waiver provision applies to the all of the claims against Motorola and the City of New York. I further hold that the claims against the City of New York do not fall within the definition of “collateral source obligation.”

As plaintiffs have elected their remedy, they have also waived the right to bring a civil action “for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001.” The Act § 405(c)(3)(B)(i). I thereby grant the defendants’ motions to dismiss. The Clerk of the Court shall mark this case as closed.

In parting, I note that after counsel finished their arguments at the oral argument, I allowed family members and others to address the court. Their presentations reminded the court of the tremendous sacrifice made by those who were lost that day and the ongoing difficulties the survivors face. The family members spoke of insufficient testing of the Fire Department’s radios and ongoing problems with the radios. They expressed reliance on upper

level officials to have rectified the problems and blamed them for having failed to do so. They highlighted that the Police Department received word, causing many to evacuate, and were able safely to leave the buildings in much greater numbers than the firefighters. In response to reports that firefighters could have evacuated but did not, one mother stated: "I'm here to . . . uphold the character and dignity of [my] son . . . [i]f he would have heard on order to evacuate, he would have evacuated . . . he loved his life. He never, never would have done anything to commit suicide." March 4, 2003 Hrg. Tr. at 44-45. The speakers expressed tremendous guilt at accepting compensation for an uncompensable loss and deep frustration at foregoing the ability to force parties to be held accountable.

The search for resolution following a tragedy such as this is difficult and the options are imperfect. A lawsuit is rarely a good means of assigning accountability. More often a lawsuit is a conduit to distribute compensation, not a mechanism to distribute blame. Congress foresaw this difficulty by accepting a collective responsibility for those who lost their lives and providing for a speedy and generous compensation procedure where the risk, burden and expense of litigation could be avoided. The surviving family members and others associated with the victims need not feel guilt. Although their losses are irreparable, there is a collective guilt and collective responsibility for that which cannot be undone, as well as resolution that a 9/11 attack should not happen again.

So Ordered.

Dated: New York, New York  
March 10, 2004

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ALVIN K. HELLERSTEIN  
United States District Judge